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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

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GEORGE DUNCAN,

Petitioner,

-against-

SHERMAN WALKER,

Respondent.

----------X

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

No. 00-121

The respondent asks leave to file the attached opposition brief to a petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis* in the following court:

United States Court of Appeals for the Second Circuit.

Counsel was appointed by the United States District Court under the Criminal Justice Act of 1964, 18 U.S.C. §3006A.

Deborah Wolkow Loewenberg
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SHERMAN WALKER
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Dated: New City, New York
October 11, 2000

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No. 00-121

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE DUNCAN, Petitioner,

v.

SHERMAN WALKER, Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court below correctly ruled that a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application?

(The question of whether the prior federal habeas corpus petition was "properly filed" is not properly presented for review in this case. This question was neither raised nor opposed by either party in their respective briefs filed with the Second Circuit Court of Appeals and it was not reached by the court below.)

OPINIONS BELOW

The opinions of the district court and the Second Circuit Court of Appeals are attached to the petition as Appendix A, Appendix B and Appendix C.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Order of the Second Circuit Court of Appeals was entered on March 27, 2000. The 90-day period for filing a petition for certiorari was extended to July 25, 2000 by Order of Justice Ginsburg, dated June 19, 2000.

STATEMENT OF THE CASE

Respondent's state conviction, which pre-dates the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), became final on April 14, 1996. On April 10, 1996, Respondent, *pro se*, filed a single document with the district court for the Eastern District of New York that included a claim under 48 U.S.C.§ 1983 and a habeas corpus petition pursuant to U.S.C. § 2254. The district court dismissed the petition without prejudice because it was unclear whether Respondent had exhausted all available states avenues of redress. Walker v. The Legal Aid Society, et al. (Appendix C attached to the Petition).

On May 22, 1997, Respondent, *pro se*, filed his second petition for a writ of habeas corpus. Applying the law of Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997), the district court dismissed the petition because it was not filed within a "reasonable time"

after the enactment of AEDPA, April 24, 1996. Walker v. Artuz, (Appendix B attached to the Petition).

The Second Circuit Court of Appeals granted Respondent's application for a Certificate of Appealability by Order entered December 1, 1998. The following questions were certified for review:

> 1. Whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 28 U.S.C.§2254 tolled the period of limitations set forth in 28 U.S.C.§2244(d)(2).
>
> 2. Whether the limitations set forth in 28 U.S.C.§2244(d) may be equitably tolled where the prior, timely-filed section 2254 petition was dismissed without prejudice for failure to exhaust all claims and the petitioner-appellant did not file a new petition stating only exhausted claims until after the one-year grace period noted in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998).

By Opinion dated March 27, 2000, the Second Circuit Court of Appeals reversed the district court and held that Respondent's second federal habeas petition was improperly dismissed as untimely. The Court ruled that the statute of limitations set forth in 28 U.S.C.§ 2244 (d)(1) was tolled with Respondent's filing of his first petition for federal habeas corpus relief because the tolling provisions set forth in 28 U.S.C. § 2244 (d)(2) include pending federal habeas petitions. Specifically, the Court held that the plain meaning of the statute compels a finding that a federal habeas petition is "collateral review". "Close analysis of the statute language, however, shows that 'State' modifies only the word 'post-conviction,' and the phrase 'other collateral' is to be given its naturally broader meaning." Walker v. Artuz, 208 F.3d 357 (2d Cir. 2000), (Appendix A attached to the Petition). The Court further held that its ruling was consistent with the overall objective of AEDPA "because the statute of limitations remains enforceable and

intact. Our interpretation merely avoids penalizing state prisoners who properly have filed federal habeas petitions and are awaiting a response from the court." Id.

REASONS FOR DENYING THE WRIT

1. Respondent respectfully submits that there are no compelling or important reasons for granting certiorari in this case. Even though the Second Circuit Court of Appeal's decision is in conflict with the Third Circuit Court of Appeals, the fact remains that the statutory prohibitions in place barring the filing of successive petitions for habeas relief address Petitioner's fear that the Second Circuit Court of Appeal's ruling will permit state petitioners to circumvent and frustrate the objectives of AEDPA.
2. The Second Circuit Court of Appeals correctly reversed the district court's Order and reinstated Respondent's petition for habeas relief.

ARGUMENT

Although there is a conflict between two circuit courts which have considered whether pending federal habeas petitions are applications for "other collateral review" within the meaning of 28 U.S.C. §2244(d)(2), the matter is not "important". (Supreme Court Rule 10). Surely, not every conflict between or among circuit courts must give rise to the issuance of a writ of certiorari. For example, certiorari was denied in Kamberos v. GTE Automatic Electric, Inc., 454 U.S. 1060 (1981) despite a direct conflict between the Fifth and Seventh Circuits in their respective interpretation of a petitioner's

responsibilities to seek a right-to-sue letter from the EEOC under the Civil Rights Act of 1964. Similarly, certiorari was denied in Greco v. Orange Memorial Hospital Corp., 423 U.S. 1000(1975) even though the Fifth Circuit was in conflict with the First, Fourth, Sixth and Eighth Circuits Court of Appeals.

In the case at bar, the Second Circuit's ruling squarely conflicts with the determination of the Third Circuit Court of Appeals in Jones v. Morton, 195 F.3d 153 (3d Cir. 1999), which determined that petitioner's federal habeas application was not an application for "other collateral review" under the meaning of AEDPA. The facts presented in Rhine v. Boone, 182 F.3d 1153 (10th Cir. 1999), however, presented a different question: does "other collateral review" encompass the pendency of an application for certiorari to this Court?

The statute at the heart of the conflict between the Second and Third Circuits is 28 U.S.C. § 2244 (d) (2), which has been in effect for more than four (4) years. However, despite the great many state prisoners who seek federal habeas relief throughout the country, the question has only reached the Circuit Courts in two of the twelve circuits since the statute's enactment. It may be said the conflict or issue is not of the magnitude warranting this Court's review, i.e., it lacks sufficient importance. Perhaps, if other circuit courts have the occasion to determine whether the statute is tolled during the pendency of a federal habeas petition, the conflict will resolve itself by one of the two circuits reconsidering its ruling.

Any fear that the Second Circuit's ruling will permit state prisoners to circumvent the objectives of AEDPA -- encouraging finality of state convictions and the timely filing of federal petitions—is dispelled by (1) the enactment of 28 U.S.C. §2244 (Finality of

determination), which prohibits the successive filing of habeas petitions, and requires the issuance of an order by the circuit court, authorizing the filing of the second or successive petition; and (2) by the tolling provisions in 28 U.S.C. §2244(d)(2), which "remain enforceable and intact." Walker v. Artuz, Id.

The Second Circuit Court of Appeals correctly ruled that the plain meaning of 28 U.S.C.§2244 (d)(2) supports the conclusion that federal habeas corpus petitions are included in "other collateral review." The phrase "State post-conviction review" is not limited to direct review. It also includes state collateral proceedings such as coram nobis petitions, state habeas petitions, and state post-conviction motions to vacate or dismiss judgments of conviction. The interpretation of the phrase "other collateral review" to mean "other State collateral review" urges a cumbersome and linguistically redundant reading of the statute. The only natural and logical reading of the statute is that federal applications, like petitions for federal habeas relief, are "other", i.e., non-state "collateral" applications.

The Second Circuit Court of Appeals looked to the "design of the statute as a whole and to its object and policy" in ruling that Respondent's time to file his federal petition was tolled by the filing of his first petition, which was dismissed without prejudice. United States v. American Trucking Association, 310 U.S. 534,542 (1940). Prior to the enactment of AEDPA, state prisoners had unrestricted time in which to seek federal habeas relief. AEDPA was enacted to encourage the swift and diligent pursuit of federal relief by state inmates, and to eliminate, what in some instances were years or decades of delay between state convictions and federal review. Valentine v. Senokowski, 966 F.Supp. 239, 241 (S.D.N.Y. 1997), citing H.R. Rep. No. 104-23 at 29. AEDPA was not

enacted to bar federal habeas review by petitioners like Respondent who filed a timely petition which was dismissed without prejudice. To be sure, the Second Circuit Court of Appeal's holding in this case is conformance with the reasoning and spirit of this Court in Stewart v. Martinez-Villareal, 523 U.S.637 (1998), when it ruled that petitioner's application was not a successive or second petition, when his first application had been dismissed as premature. This Court reasoned that "(t)o hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." Id. at 645. See, also, Slack v. McDaniel, ___U.S.___ (2000), 120 S.Ct. 1595.

As the Second Circuit Court of Appeals noted in Walker v. Artuz, Id., "Our interpretation merely avoids penalizing state prisoners who properly have filed federal habeas petitions and are awaiting a response from the court." The period of limitations was enacted to compel state inmates to swiftly bring their constitutional claims to federal court, not as a penalty for state inmates, like Respondent, who diligently seek post-conviction review and who properly file their federal habeas petitions.

CONCLUSION

Based upon these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DEBORAH WOLIKOW LOEWENBERG
Attorney for Respondent Sherman Walker

October 10, 2000

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class, United States Mail, postage prepaid to the following persons, on the 11th day of October, 2000. I further certify that all parties have been served:

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Notary Public

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Qualified in Rockland County
Commission Expires November 30, 2002